PD-1289-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/6/2020 11:00 PM
Accepted 7/7/2020 8:46 AM
DEANA WILLIAMSON
CLERK

NO. PD-1289-19

FILED
COURT OF CRIMINAL APPEALS
7/7/2020
DEANA WILLIAMSON, CLERK

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

RICARDO ROMANO

V.

STATE OF TEXAS

**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CAUSE NO. 01-18-00538-CR**

**Appealed from the
County Criminal Court at Law No. 6
of Harris County, Texas
Cause Number 2167075**

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
RICARDO ROMANO

ORAL ARGUMENT NOT GRANTED

IDENTITY OF THE PARTIES

Appellant:	Ricardo Romano
Trial Counsel:	Carl Haggard 1217 Prairie, Ste. 201 Houston, TX 77002
Appellate Counsel:	Josh Schaffer 1021 Main, Ste. 1440 Houston, TX 77002
Appellee:	The State of Texas
Trial Counsel:	Michael Mitchell 500 Jefferson, Ste. 600 Houston, TX 77002
Appellate Counsel:	Cory Stott 500 Jefferson, Ste. 600 Houston, TX 77002
Trial Judge:	Honorable Larry Standley 1201 Franklin Houston, TX 77002

SUBJECT INDEX

Page

INDEX OF AUTHORITIES

Page

Statutory Provisions

Rules

Miscellaneous **Page**

STATEMENT OF THE CASE

Appellant waived a jury and pled not guilty to Class B misdemeanor indecent exposure in cause number 2167075 in the County Criminal Court at Law Number 6 of Harris County before the Honorable Larry Standley. After a bench trial, the court convicted him, assessed punishment at three days in jail and a $1,000 fine, and ordered him to register as a sex offender for ten years on May 18, 2018. Carl Haggard represented him at trial.

In an unpublished opinion issued on October 8, 2019, the First Court of Appeals vacated appellant's conviction and issued an appellate acquittal because the evidence was legally insufficient. *Romano v. State*, No. 01-18-00538-CR, 2019 WL 4936040 (Tex. App.—Houston [1st Dist.] Oct. 8, 2019, pet. granted) (unpublished). The court of appeals denied the State's motion for *en banc* rehearing. This Court granted the State's petition for discretionary review on May 6, 2020. Present counsel represented appellant in the court of appeals.

ISSUES PRESENTED

Whether this Court should dismiss the State's petition for discretionary review as improvidently granted.

Whether the court of appeals misapplied the standard for reviewing the legal sufficiency of the evidence.

STATEMENT OF THE FACTS

A. The Information

The information alleged that, on or about August 23, 2017, appellant unlawfully exposed his genitals to R. Gardiner with the intent to arouse and gratify appellant's sexual desire, and appellant was reckless about whether another person was present who would be offended and alarmed by the act, in that he masturbated in a public park (C.R. 7).

B. The State's Case

Houston Police Department Sergeant Ryan Gardiner was assigned to mounted patrol in Memorial Park, a public place in Houston, on August 23, 2017 (1 R.R. 9-10). He rode his horse to a remote part of the park about 10:30 a.m. and concealed himself behind trees and bushes (1 R.R. 11-12, 28).

Appellant parked his car in an empty parking lot in the park (1 R.R. 12, 48). No one else was in the lot or on the street, and no pedestrians or bicyclists were in the area (1 R.R. 30-31, 50). A bike trail was about 100 feet away from appellant's car (1 R.R. 31). Gardiner was suspicious of appellant because there were "very few reasons" to park there (1 R.R. 12).[1] Appellant exited, walked around and opened the passenger door, and went to the rear of his car (1 R.R. 13, 31-32).

Gardiner watched appellant through an opening in the wood line (1 R.R. 13).

[1] Gardiner did not explain why it was suspicious to park a car in a parking lot in a public place in the middle of the day.

Gardiner testified that appellant pulled down the top of his shorts with one hand and began to masturbate with his other hand (1 R.R. 14, 32).[2] Gardiner asserted that he saw appellant's penis but did not know whether it was circumcised (1 R.R. 45). On Gardiner's body camera video recording of the incident, he stated that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Gardiner assumed that appellant was doing this to gratify himself (1 R.R. 14). Gardiner called his partner over the radio and rode his horse toward appellant as soon as he saw appellant touch his penis (1 R.R. 14, 43-44). About one minute transpired from when appellant pulled into the parking lot until Gardiner called his partner (1 R.R. 40-41).

Appellant saw Gardiner approaching and reached into the car (1 R.R. 15). Gardiner arrested appellant for indecent exposure at 12:17 p.m. (1 R.R. 15, 28-29). Appellant immediately denied masturbating, said that he was trying to urinate, and asked Gardiner to review his body camera video footage to confirm what appellant claimed (1 R.R. 15, 41-42). Appellant asked Gardiner why he would masturbate with no one around (1 R.R. 45). Gardiner did not see any urine on the ground, and a restroom was across the street (1 R.R. 15-16). Gardiner searched appellant's car but did not find anything that could be used to aid masturbation (1 R.R. 39-40).

Gardiner was the only person who saw appellant touch his penis (1 R.R. 16).

[2] Gardiner had binoculars but did not use them after appellant parked (1 R.R. 33, 38-39).

However, Gardiner testified that there was a risk that other pedestrians and motorists in the park *could have* seen appellant, and he opined that appellant disregarded that risk (1 R.R. 16-17). Gardiner admitted that appellant's car may have blocked anyone using the bike trail from seeing appellant (1 R.R. 33).

C. The Defense's Case

Appellant, age 48, testified that he stopped his car in Memorial Park to review some paperwork on his way downtown (1 R.R. 56-58). He parked near some bushes on the edge of a parking lot and exited to urinate by his car (1 R.R. 58-59, 64). He did not believe that it was reckless to urinate there, and he was not masturbating (1 R.R. 59-60). As soon as he pulled out his penis, he heard branches move (1 R.R. 60-61). No one was around, and he suspected that someone was behind the bushes (1 RR. 61). He did not actually urinate because Gardiner emerged before he could do so (1 R.R. 62). He did not expect to see anyone there, and no one else was in that area of the park other than Gardiner (1 R.R. 63).

D. The Closing Arguments

The prosecutor argued in summation that Gardiner "was convinced" that he saw appellant masturbate (1 R.R. 69). Defense counsel replied that Gardiner was mistaken about what he saw because he was too far from appellant (1 R.R. 69-70). No one was present besides Gardiner, who was hiding in the bushes. Counsel asserted that appellant was not reckless about whether someone was present who

would be offended and alarmed, no matter what he was doing (1 R.R. 70-71).

E. The Verdict and Sentence

The trial court convicted appellant of indecent exposure, assessed punishment at three days in jail and a $1,000 fine, and ordered him to register as a sex offender for ten years (C.R. 59-62; 1 R.R. 71; 2 R.R. 19-21, 24). The court stated that the prosecution's direct examination of Gardiner "wasn't the best" but that the verdict "boiled down to credibility" (1 R.R. 77).

F. The Court of Appeals' Decision

Appellant raised three issues on appeal. The first issue—that the evidence was legally insufficient to sustain the conviction—was based on two theories. First, he asserted that the evidence was insufficient to establish the element of the offense that he exposed his genitals with intent to arouse or gratify the sexual desire of any person. Second, he alleged that the evidence was insufficient to establish the element that he was reckless about whether another person was present. The court of appeals only addressed whether the evidence was sufficient to establish that appellant acted recklessly. Because the court of appeals addressed neither whether the evidence was sufficient to establish that appellant exposed his genitals with intent to arouse or gratify the sexual desire of any person nor the other two issues that he raised, this Court must remand to the court of appeals for consideration of the other issues if it reverses that court's judgment.

The court of appeals reviewed the evidence in the light most favorable to the prosecution and identified where the record conflicted with the trial court's finding that appellant was reckless about the presence of another person:

- Appellant "parked his car at the very edge of the parking lot, parallel to some bushes and in the shade with nobody around. The video confirms this testimony." *Romano*, 2019 WL 4936040, at *6.

- "Gardiner testified that there was a bike trail about a 'hundred or so' feet in front of Romano's parked car and admitted that because of where Romano's car was parked and with the open passenger door, Romano's car 'may have blocked' a view of Romano from the bike trailhead." *Id.*

- "During Gardiner's fifty-five seconds of surveillance of Romano, no pedestrians or park patrons are visible on the video. Gardiner testified that no one other than Romano was in the parking lot and that the nearest parking lot where someone might be parked was an estimated quarter-mile away. He also testified that, from his hidden vantage point, he could not see any people in the area at the time that Romano was exposing himself, and he admitted that no one was on the street to have seen Romano. Gardiner, who was admittedly hiding from Romano, believed that he was the only person who saw Romano expose himself." *Id.*

- "The undisputed, objective evidence is that Romano made deliberate efforts to shield himself from the view of others and that Romano was unaware that Gardiner was hiding a good distance away in the trees and bushes." *Id.*

The court of appeals concluded:

> [T]he evidence of Romano's making deliberate efforts to shield himself from the view of others, his unawareness of the hidden Gardiner, and the absence of any other person is undisputed, objective evidence that supports only one logical inference—that Romano was not disregarding a substantial risk that someone might see him expose

> himself. . . . Therefore, we conclude that a rational trier of fact could not have found beyond a reasonable doubt that Romano was reckless about whether another was present who would be offended or alarmed by Romano's exposure of his genitals.

Id.

SUMMARY OF THE ARGUMENT

The Court should dismiss the State's petition for discretionary review as improvidently granted. The court of appeals' non-precedential, unpublished decision is a straightforward, fact-specific application of the well-established standard of reviewing whether evidence is legally insufficient to sustain a conviction. The court of appeals addressed no significant issue that warrants this Court's limited resources. The decision does not conflict with a decision of another courts of appeals, this Court, or the United States Supreme Court; does not involve an important legal question that has not been, but should be, resolved by this Court; does not involve the constitutionality or misconstruction of a statute; does not involve a disagreement among lower court justices on a material legal question; and does not depart from the accepted and usual course of judicial proceedings (and certainly not so far a departure as to warrant this Court's intervention). *See* TEX. R. APP. P. 66.3. The only reason to review this decision is to scrutinize the court of appeals' application of the *Jackson v. Virginia* standard to the particular facts of this case. Because the court of appeals applied the correct standard of review to decide the issue, and this Court is not a "court of error" in

non-capital cases, it should dismiss the State's petition as improvidently granted.

Alternatively, the court of appeals did not misapply the *Jackson v. Virginia* standard of reviewing whether the evidence is legally insufficient to sustain appellant's conviction for indecent exposure. On the contrary, it correctly applied that standard. The incontrovertible evidence—a police body camera video recording of the incident that clearly depicts Gardiner's point of view—demonstrated that appellant did not act recklessly regarding whether another person was "present" when he exposed his genitals. The Penal Code does not define "present," but the dictionary definition requires that a person be "in view or at hand" to be "present." But neither Gardiner nor anyone else was in view or at hand—meaning in the "immediate vicinity"—when appellant exposed his genitals. Rather, Gardiner was hidden from view and a substantial distance from appellant when he engaged in the conduct. The indisputable video evidence contradicts Gardiner's testimony that another person was "present." Appellant was not reckless about whether another person was present who would be offended and alarmed by the conduct, and the court of appeals did not err in concluding that the evidence of that element was legally insufficient.

ISSUE ONE

THIS COURT SHOULD DISMISS THE STATE'S PETITION FOR DISCRETIONARY REVIEW AS IMPROVIDENTLY GRANTED.

Without addressing the merits of the issue, the Court should dismiss the State's petition for discretionary review as improvidently granted. The State asked the Court to grant review because it contended that the court of appeals' unpublished, nonprecedential opinion "misapplied the standard of review in this case." State's Petition at 6. The State did not allege that the court of appeals applied the *wrong* standard of review, nor did it identify any unresolved, important issue dividing the lower courts or some other substantial issue of statewide importance worthy of this Court's review. It merely asserted that the court of appeals' unpublished decision "so far departed from the accepted and usual course of judicial proceedings" to warrant this Court's scarce judicial resources. *Id.* at 7 (citing TEX. R. APP. P. 66.3(f)).

The State's curt petition devoted slightly more than three pages to its legal argument. State's Petition at 6-10.[3] The State made only *fact-specific arguments* about whether the evidence was sufficient to sustain appellant's conviction, not legal arguments about whether the court of appeals applied the wrong standard of review or whether this case presents a novel, important legal issue that this Court

[3] Similarly, the State's merits brief, which is practically the same as its petition, devotes equally sparse attention to the legal argument. State's Brief on Discretionary Review at 5-8.

has not, but should, resolve. Notably, the court of appeals did not cite invalid caselaw in its discussion of the standard of review[4] or in its application of the law to the facts.[5] To the contrary, the court of appeals cited valid, applicable caselaw when discussing the standard. The State simply does not agree with that court's fact-specific holding.

The State wants this Court to engage in "error correction," pure and simple. Yet, "[t]his [Court] is not a court of 'error correction.'" *Bradley v. State*, 235 S.W.3d 808, 810 (Tex. Crim. App. 2007) (Cochran, J., concurring in refusal of PDR, joined by Meyers, Johnson, and Holcomb, JJ.). The Court should dismiss

---

[4] The court of appeals correctly stated:

> In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018). We determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* . . . As an appellate court, we do not weigh the evidence or assess its credibility. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). "As a reviewing court, we may not reevaluate the weight and credibility of the evidence in the record and thereby substitute our own judgment for that of the factfinder." *Braughton*, 569 S.W.3d at 608. **But it is our role to determine "whether the necessary inferences made by the trier of fact are reasonable, based on the cumulative force of all the evidence." *Id.* (quoting *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim App. 2011)). Also, a factfinder "is not permitted to disregard undisputed objective facts that can support only one logical inference." *Id.* at 611.**

Romano, 2019 WL 4936040, at *4 (emphasis added).

[5] *Id.* at *5-*6.

the State's petition as improvidently granted, as it has done in other cases raising whether the evidence was legally sufficient. *See, e.g., Hernandez v. State*, 2020 WL 3067569 (Tex. Crim. App. June 10, 2020) (unpublished) (dismissing as improvidently granted defendant-appellant's PDR raising legal sufficiency); *Dodd v. State*, 2005 WL 8154129 (Tex. Crim. App. 2005) (unpublished) (dismissing as improvidently granted State's PDR raising legal sufficiency); *Riggs v. State*, 745 S.W.2d 1 (Tex. Crim. App. 1988) (same).

ISSUE TWO

THE COURT OF APPEALS DID NOT MISAPPLY THE STANDARD FOR REVIEWING THE LEGAL SUFFICIENCY OF THE EVIDENCE.

A. Standard of Review

When reviewing the legal sufficiency of the evidence, an appellate court must view all the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018). The court determines whether, based on the evidence at trial, a "rational trier of fact" could have found the essential elements of the charged offense beyond a reasonable doubt. *Braughton*, 569 S.W.3d at 608. In conducting this type of appellate review, an appellate court should not weigh competing evidence or assess the credibility of witnesses. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, the court must give deference to

"the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

"[T]he State need not disprove all reasonable alternative hypotheses [based on the evidence] that are inconsistent with the defendant's guilt." *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). However, when assessing the sufficiency of the evidence, a reviewing court must "consider the countervailing evidence as well as the evidence that supports the verdict" in determining whether a rational factfinder would have found each element beyond a reasonable doubt. *United States v. Smith*, 739 F.3d 843, 845 (5th Cir. 2014) (citations and internal quotation marks omitted).

B. The Evidence Is Legally Insufficient To Establish That Appellant Was Reckless About Whether Another Person Was "Present."

The central issue is whether appellant was reckless about whether another person was present where the evidence unequivocally established that the only person in the area, Gardiner, was concealed from appellant's view a substantial distance behind trees and bushes. The court of appeals did not misapply the standard of reviewing a challenge to the legal sufficiency of the evidence. It expressly deferred to the factfinder—the trial court at the bench trial—and concluded that no rational factfinder could find beyond a reasonable that appellant was reckless about whether another person was present, an essential element of §

21.08(a) of the Penal Code.[6] After carefully reviewing all the evidence, both supporting the conviction and the incontrovertible countervailing evidence, the court concluded: "Indecent exposure cases—especially those occurring in public parks—that address the sufficiency of the evidence on the recklessness element involve a common feature lacking in this case: the defendant's knowledge or awareness of another person's presence." *Romano*, 2019 WL 4936040, at *5.

To be "reckless," a defendant must have (1) been subjectively "aware" of the "substantial and unjustifiable risk" that specific circumstances existed and (2) "consciously disregard[ed]" that risk. TEX. PENAL CODE § 6.03(c);[7] *see Williams v. State*, 235 S.W.3d 742, 753-54 & n.35 (Tex. Crim. App. 2007) (State must prove "actual, subjective 'disregard of the risk'"; recklessness *mens rea* requires that "substantial and unjustifiable risks *were known to*, but disregarded by, the actor") (emphasis added); *see also Ex parte Peterson*, 117 S.W.3d 804, 828 (Tex. Crim. App. 2003) (Hervey, J., dissenting on grounds not in conflict with majority, joined by Keller, P.J., & Keasler, J.) (defining recklessness as "subjective mental state,"

[6] Section 21.08(a) provides: "A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act."

[7] Section 6.03(c) provides: "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct *when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur*. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint" (emphasis added).

citing Penal Code § 6.03(c)), *maj. op. overruled by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

In incident exposure cases, "the issue, therefore, is whether appellant was reckless about whether another was present who would be offended . . . ." *Hefner v. State*, 934 S.W.2d 855, 857 (Tex. App.—Houston [1st Dist.] 1996, pet ref'd). The offense requires that the defendant actually expose himself to another person. *Young v. State*, 976 S.W.2d 771, 773-74 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (citing *McGee v. State*, 804 S.W.2d 546, 547 (Tex. App.—Houston [14th Dist.] 1991, no pet.)). The court of appeals correctly concluded that the evidence failed to establish that appellant was "reckless about whether another [was] present who [would] be offended or alarmed by his act." TEX. PENAL CODE § 21.08(a).

Unlike the term "reckless," no statute defines "present." Therefore, courts must apply the ordinary, dictionary definition. *See Clinton v. State*, 354 S.W.3d 795, 800-01 (Tex. Crim. App. 2011) (applying *Webster's Third New International Dictionary* definition of statutorily undefined verb "present" in different penal statute); *see also Velasquez v. State*, 2018 WL 416494, at *4 (Tex. App.—Dallas 2018, no pet.) (unpublished) ("Because the Texas Penal Code does not define 'present' for purposes of section 21.11(a)(2)(A), we give the term its common and ordinary meaning, unless doing so would lead to an absurd result. . . . *Merriam-Webster* dictionary defines [the adjective] 'present' as 'being in view or at

hand.'"); *United States v. Lawrence*, 248 F.3d 300, 303 (4th Cir. 2001) ("*Webster's* defines 'presence' as '[t]he state or fact of being present,' and '[i]mmediate proximity in time or space.' . . . 'Present' is then defined as '[b]eing at hand.' *Id.* Another version of *Webster's* also makes clear that 'presence' means physical presence. It defines 'presence' as 'the part of space within one's immediate vicinity.' *Merriam-Webster's Collegiate Dictionary* 921 (10th ed. 1999).").

Considering the statutory definition of "reckless" and the plain meaning of "present," the only manner in which a defendant can violate § 21.08(a) is to have subjective awareness of a "substantial" risk of another person's being "in view or at hand" (*i.e.*, in the "immediate vicinity") of where the defendant is exposing his genitals. The indisputable video evidence, which is of excellent quality, clearly establishes that appellant was not subjectively aware of such a substantial risk and then consciously disregarded it (3 R.R. SX 2). Gardiner was neither "in view" nor in the "immediate vicinity" of appellant when he exposed his genitals. Rather, the video evidence unequivocally demonstrates that Gardiner was hiding behind large bushes and tree branches far from appellant.

This Court has held that appellate courts must not defer to a trial court's clearly erroneous fact findings that are based on a police officer's testimony when indisputable video evidence contradicts that testimony. *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) (when "videotape [evidence] presents

indisputable visual evidence contradicting essential portions of [police officer's] testimony," appellate court must not defer to trial court's explicit or implicit findings based on officer's inconsistent testimony); *see also Tucker v. State*, 369 S.W.3d 179, 186 (Tex. Crim. App. 2012) (where testimony conflicted, court of appeals should have viewed video evidence to determine whether totality of evidence supported trial court's ruling); *id.* at 187 (Alcala, J., concurring) ("[W]hen evidence is conclusive, such as a written and signed stipulation of evidence or 'indisputable visual evidence,' then any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling.") (citing *Carmouche*).

Carmouche involved a pretrial motion to suppress evidence. No Texas court has addressed the related question presented in this case—how appellate courts should treat indisputable visual evidence that contradicts witness testimony when reviewing the legal sufficiency of the evidence to sustain a conviction. This Court ordinarily leaves such open questions to lower courts to resolve, which supports dismissing the State's petition as improvidently granted. However, if the Court decides to reach the merits, it should extend *Carmouche* to legal sufficiency claims. There is no reason to treat indisputable video evidence differently when reviewing legal sufficiency claims and pretrial motions to suppress evidence.

The Indiana Supreme Court recently considered this issue and cited *Carmouche* to conclude that appellate courts reviewing legal sufficiency claims should not defer to fact findings when indisputable visual evidence contradicts them. *See Love v. State*, 73 N.E.3d 693, 695 (Ind. 2017) ("We hold that Indiana appellate courts reviewing the sufficiency of evidence must apply the same deferential standard of review to video evidence as to other evidence, *unless the video evidence indisputably contradicts the trial court's findings*.") (emphasis added). The Florida Supreme Court best articulated the reason for this rule:

> We respect the authority and expertise of law enforcement officers, and thus rely on an officer's memory when necessary. But we would be remiss if we failed to acknowledge that at times, an officer's human recollection and report may be contrary to that which actually happened as evinced in the real time video. This is the reality of human imperfection; we cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result.

Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles, 209 So.3d 1165, 1172 (Fla. 2017). *See also City of Missoula v. Metz*, 451 P.3d 530, 539 (Mont. 2019) (citing *Carmouche* and *Wiggins* in holding that appellate courts may not disregard video evidence that contradicts testimony found credible by lower court); *Commonwealth v. Novo*, 812 N.E.2d 1169, 1173 (Mass. 2004) (adopting *de novo* standard for reviewing video evidence because appellate court in same position as

trial court to assess it); *cf. Scott v. Harris*, 550 U.S. 372, 378-81 (2007) (considering indisputable video evidence to reverse lower court's refusal to grant summary judgment for police officer in civil rights lawsuit; "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.").

Video evidence will be used in exponentially more trials moving forward as police agencies use body and dashboard cameras and citizens use cell phone cameras to record police encounters with citizens. To promote good public policy, this Court should hold that an appellate court may not disregard indisputable video evidence that contradicts testimony that the factfinder credited. Ordinarily, an appellate court defers to fact findings that are based on witness credibility and demeanor. Whether such findings occur during an evidentiary hearing on a pretrial motion to suppress evidence or during a trial is immaterial. If other evidence contradicts the testimony of the witness(es) that the factfinder credited in support of its legal conclusion—whether to grant or deny a suppression motion or to convict—an appellate court usually defers to that judgment call and assumes that the factfinder found the controverting evidence incredible or unpersuasive.

That rule worked well without modification before contemporaneous video recordings of police-citizen encounters became the new norm. The general rule is

no longer workable when indisputable visual evidence clearly demonstrates what occurred during an encounter and that a witness could not have seen what he testified that he saw. Moving forward, if a police officer testifies that a defendant engaged in conduct, and the factfinder credits that testimony and decides a dispositive issue against the defendant while ignoring controverting, indisputable visual evidence that demonstrates that the defendant did *not* engage in the conduct, an appellate court must not allow that clearly erroneous outcome to stand. Absurd results would flow from a rule that instructed appellate courts to disregard indisputable visual evidence that disproves that the defendant committed the offense. Consider the following hypothetical cases:

- A suspect dies during an attempt by police to arrest him for a non-violent misdemeanor. The community is outraged, and the arresting officer is prosecuted for murder. The officer elects a jury trial because the evidence shows that he did not cause the suspect's death. Multiple citizens who witnessed the incident testify that the officer placed his knee on the suspect's neck for several minutes and suffocated him until he could not breathe. None of the citizens provides corroborating visual evidence. The officer denies placing his knee on the suspect's neck, introduces police body camera evidence that indisputably demonstrates that he did *not* place his knee on the suspect's neck, and presents medical testimony that the suspect had an underlying medical condition that could have caused his death during the stress of the arrest. The jury convicts, eager to send a message to police that citizens need to stop dying in police custody as well as to the community that juries will no longer credit police testimony automatically.

- Another suspect dies during an attempt to arrest him for DWI. The community is apoplectic, and the arresting officer is prosecuted for murder. Worried about the mob-mentality of the community and after seeing the jury in the other officer's trial disregard the evidence, the

> officer waives a jury and elects to have a bench trial. He is confident that a fair-minded jurist will follow the evidence that he acted in self-defense instead of succumbing to public pressure to convict. Multiple citizens who witnessed the incident testify that the officer drew his firearm on the suspect and assassinated him without provocation or justification. None of the citizens provides corroborating visual evidence. The officer testifies that the suspect took his partner's firearm during the struggle to detain him, began to flee, and turned and pointed the firearm at both officers, at which time the officer fired his weapon in defense of himself and his partner. The partner corroborates this testimony, and police body camera evidence indisputably corroborates both officers' testimony. The court convicts, concerned by the public's reaction should the officer be acquitted and resigned to place the burden of reversing the conviction on an appellate court.

Under the State's theory, appellate courts reviewing legal sufficiency claims in these hypothetical cases must sustain both convictions despite the indisputable video evidence that contradicts the testimony on which the factfinders based their verdicts. That is contrary to *Jackson v. Virginia* and its progeny. The public will lose confidence in the judicial system should the Court adopt a rule that would permit these results to stand despite indisputable video evidence. This Court should follow *Love* and extend *Carmouche* to hold that Texas appellate courts reviewing legal sufficiency claims should apply the same deferential standard of review to video evidence as to other evidence unless the video evidence indisputably contradicts the verdict, which occurs when no reasonable person can view the video and come to a different conclusion. *See Love*, 73 N.E.3d at 699.

Applying the *Carmouche/Love* test to appellant's case, the court of appeals did not err in concluding that the evidence was legally insufficient to establish that

appellant was reckless about whether another person was present when he exposed himself. Gardiner's body camera video indisputably demonstrates that he did not see what he testified that he saw. No reasonable person could view the video and come to a different conclusion. The recording allows for an objective, reliable estimate concerning how far away he was from appellant as he hid in the bushes. The video shows Gardiner exit the bushes and ride his horse for 12 seconds—from 2:27 to 2:39 on the recording—before he came close—approximately "ten yards," *Romano*, 2019 WL 4936040, at *3—to where appellant stood next to his car. Assuming that the horse galloped 25 miles per hour for eight of those 12 seconds (speeding up and slowing down the first and last two seconds), it traveled more than 100 yards before stopping within 10 yards of appellant. Horses, other than professional racehorses, typically gallop between 25 and 30 miles per hour.[8] A horse galloping 25 miles per house for eight seconds would travel about 37 feet per second, or 98 yards plus the additional distance for the other four seconds.[9] Even if Gardiner's horse traveled less than 25 miles per hour at its highest speed—assume 15 miles per hour—Gardiner would have traveled 22 feet per second for those eight seconds, or about 59 yards plus the additional distance for the other

[8] *See Speed of Animals: Horses*, http://www.speedofanimals.com/animals/horse ("The gallop averages 40 to 48 kilometres per hour (25 to 30 mph).").

[9] To convert speed from miles per hour to feet per second, multiply by 5,280, then divide by 3,600. *See How to Covert Miles Per Hour to Feet Per Second*, https://sciencing.com/convert-mph-feet-per-second-2306812.html.

four seconds. The Court also must account for the 10 yards from appellant that the horse stopped. *Romano*, 2019 WL 4936040, at *3. Thus, when Gardiner hid in the bushes, he was at least 75 yards and plausibly more than 100 yards from appellant.[10] That is a significant distance, and certainly not "in view or at hand." Gardiner simply was not "present" when appellant exposed himself.

Gardiner also falsely asserted, both to appellant after arresting him and in his offense report, that he used binoculars to observe appellant allegedly masturbate. Gardiner admitted this falsity—a felony offense[11]—under oath.[12] Even if true, the need to use binoculars to observe appellant demonstrates how far Gardiner was

---

[10] The court of appeals asserted that Gardiner's distance from appellant when hiding behind the bushes "appears less than a football field" but declined to "speculate." *Romano*, 2019 WL 4936040, at *2, n.3. Even using appellant's conservative estimate of the horse's speed for eight of the 12 seconds, the distance would be nearly 100 yards.

[11] *Wingo v. State*, 189 S.W.3d 270 (Tex. Crim. App. 2006) (affirming police officer's conviction for tampering with government record in violation of Penal Code § 37.10 by including false information in offense report).

[12] Gardiner incriminated himself when testifying:

> Q. . . . You wrote a police report . . . that said . . . "I also used binoculars to watch the suspect"?
>
> A. Right . . . .
>
> Q. . . . Just to be clear, Sergeant Gardiner, the only time you used your binoculars is actually before [appellant] even gets to the parking lot, correct?
>
> A. That's correct, yes.

(1 R.R. 33, 38.) Gardiner admitted under oath that the video recording showed that he did not use binoculars to observe appellant (1 R.R. 38-39). He also admitted to falsely writing in his offense report that he saw appellant masturbate through his binoculars (1 R.R. 33, 38).

from appellant. Why was Gardiner compelled to lie to appellant that he watched appellant with binoculars—clearly hoping to obtain a confession—unless the bushes where Gardiner hid were so far away that he could not see appellant with the naked eye? Had Gardiner been close to appellant when he exposed his genitals—indeed, had Gardiner been "present"—Gardiner would not have lied about using binoculars to watch appellant.

When viewing the evidence in the light most favorable to the prosecution, the record permits only one rational finding: Gardiner, while hiding in the bushes far from appellant, was not "present" when appellant exposed himself. This incontrovertible fact undermines the essential element of the offense that appellant was reckless—that he had subjective knowledge of a substantial risk that someone was "present" when he exposed himself. Appellant was not subjectively aware of anyone until Gardiner dramatically exited the bushes on a charging horse, at which time appellant became aware of him and stopped exposing himself (1 R.R. 61).[13]

[13] When asked at trial why he "put his hands back inside [his] vehicle" when Gardiner approached him from the bushes, appellant responded that he "freaked out" when he "saw the branches moving" and that he became "embarrassed [that] someone was watching me . . . so I immediately just pretended I was doing nothing" (1 R.R. 61). Therefore, although appellant testified that he "suspected that someone was behind the bushes" (1 R.R. 61), he was referring to the moment when the horse exited the bushes. Importantly, he did not admit that he suspected that a person was in the bushes when he first exposed his genitals. Appellant's contemporaneous comments on the video recording (around 3:54 and 5:24-5:32) confirm that he meant that he placed his hands in his vehicle only when he saw Gardiner approach him. In addition, Gardiner's testimony (1 R.R. 14-15, 44) and contemporaneous statements to appellant captured on the video recording—that he saw appellant "jump[]" and quickly put his hands inside his car only after Gardiner started to approach appellant (around 5:05-5:18)—also confirm that appellant was referring to the branches moving immediately before Gardiner exited the bushes.

The record established that, when Gardiner emerged from the bushes, appellant immediately stopped exposing his genitals.[14] Thus, he could not have then violated the statute. The record also established that Gardiner, while hiding in the bushes, was the only person who allegedly saw appellant expose his genitals (1 R.R. 16, 30-31, 49-50). Because Gardiner was hiding out of sight far away, he was not "present" and, thus, appellant was not "reckless" under § 21.08(a).

C. Additional Countervailing Evidence Established a Reasonable Doubt

Additional, incontrovertible evidence objectively established a reasonable doubt. An appellate court must consider such countervailing evidence in its sufficiency analysis. *Smith*, 739 F.3d at 845.

First, *immediately* after Gardiner accused appellant of masturbating, appellant told Gardiner that he needed to urinate because he was drinking from a large container of water in his car, which clearly appears in the video recording.[15] The presence of the water bottle corroborates his immediate explanation for his conduct and is not a mere coincidence. Second, appellant did not confess when confronted with Gardiner's lie that he used binoculars to see appellant masturbate. To the contrary, appellant repeatedly asked Gardiner to watch the body camera

[14] On the video recording (around 5:05-5:18), Gardiner repeatedly told appellant that, once Gardiner exited the bushes, he saw appellant put his hands inside his car.

[15] Appellant made those comments around 3:02, 4:14, and 11:53 on the video recording (3 R.R. SX 2). The large bottle of water on the front seat of his car appears around 7:18.

footage, which appellant insisted would confirm that he was not masturbating.[16] A guilty person would not insist that a police officer watch the video recording when the officer says that he used binoculars to see the person commit the crime.

Appellant's immediate explanation that he needed to urinate because he was drinking water and his repeated insistence that Gardiner watch the video constitute strong circumstantial evidence of innocence that, combined with the video, created a reasonable doubt even when viewed in the light most favorable to the verdict.

CONCLUSION

The Court should dismiss the State's petition as improvidently granted or, alternatively, affirm the judgment of the court of appeals. Should the Court reverse the judgment of the court of appeals, it must remand to that court for consideration of the other issues that appellant raised on appeal.

Respectfully submitted,

/s/ Josh Schaffer
Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
RICARDO ROMANO

[16] Those comments appear around 9:53, 9:58, and 10:40 (3 R.R. SX 2).

CERTIFICATE OF SERVICE

I served a copy of this brief on Cory Stott, assistant district attorney for Harris County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service on July 6, 2020.

/s/ Josh Schaffer
Josh Schaffer

CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 6,376 words. This document complies with the typeface requirements of Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/s/ Josh Schaffer
Josh Schaffer

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Josh Schaffer
Bar No. 24037439
josh@joshschafferlaw.com
Envelope ID: 44290069
Status as of 07/07/2020 08:46:50 AM -05:00

Associated Case Party: STATEOFTEXAS

Name	BarNumber	Email	TimestampSubmitted	Status
Cory Stott		stott_cory@dao.hctx.net	7/6/2020 11:00:23 PM	SENT

Associated Case Party: RICARDO ROMANO

Name	BarNumber	Email	TimestampSubmitted	Status
Josh Schaffer		josh@joshschafferlaw.com	7/6/2020 11:00:23 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		stacey.soule@spa.texas.gov	7/6/2020 11:00:23 PM	SENT